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In the Supreme Court of the United States

OCTOBER TERM, 1979

MORRIS WEINTRAUB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The district court did not issue a written opinion (Pet. App. 17a). The opinion of the court of appeals (Pet. App. 18a-44a) is reported at 613 F. 2d 612.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1979 (Pet. App. 45a-46a). It denied a petition for rehearing filed by petitioner on February 4, 1980 (Pet. App. 47a). The petition for a writ of certiorari was filed on March 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the decision below correctly held that an action brought by the government under Section 6332 of the Internal Revenue Code against petitioner for failure to

honor a levy to enforce a tax assessment issued to a third party is not subject to the six-year statute of limitations provided by Section 6502 of the Code for the collection of taxes after assessment.

2. Whether the decision below correctly held that the doctrine of laches did not bar this suit brought by the government for failure to honor a levy.

STATUTES INVOLVED

Section 6332(c)(1) of the Internal Revenue Code of 1954 (26 U.S.C.) provides as follows:

> SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.
>
> (c) *Enforcement of levy.*—
>
> (1) Extent of personal liability.—Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made * * * . Any amount * * * recovered under this paragraph shall be credited against the tax for the collection of which such levy was made.

Section 6502 of the Internal Revenue Code of 1954 (26 U.S.C.) provides in pertinent part as follows:

> SEC. 6502. COLLECTION AFTER ASSESSMENT.
>
> (a) *Length of Period.*—Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—
>
> (1) within 6 years after the assessment of the tax, * * *
>
> (2) * * *
>
> * * * * *
>
> (b) *Date When Levy Is Considered Made.*—The date on which a levy on property or rights to property is made shall be the date on which the notice of seizure provided in section 6335(a) is given.

STATEMENT

This is an action brought by the United States to enforce personal liability under Section 6332(c)(1) of the Internal Revenue Code of 1954 (26 U.S.C.) against petitioner for failure to honor a levy served on him on May 3, 1963, demanding payment to the Internal Revenue Service of any money which petitioner then owed to Frank Andrews, against whom an assessment of wagering excise taxes of $688,734 had been made the previous day. In 1960, petitioner had borrowed $135,000 from Andrews in order to finance the purchase of two parcels of real estate in Arizona. In 1961, petitioner made a partial payment on his note to Andrews, reducing the balance due to $120,760. In August, 1963, when petitioner was served with a final demand for surrender of the amount he owed to Andrews, he denied having any such indebtedness at the time the levy was served or thereafter (Pet. App. 18a-21a).

In 1964, petitioner was indicted on one count of willfully concealing his debt to Andrews in violation of 26 U.S.C. 7206(4), and on two counts of willfully and knowingly making false statements to officers of the Internal revenue Service concerning the alleged cancellation of this indebtedness, in violation of 18 U.S.C. 1001. Petitioner was acquitted on all three counts in September 1965 (Pet. App. 22a).

In January 1976, the government instituted this action in the United States District Court for the Southern District of Ohio under Section 6332(c)(1) of the Internal Revenue Code to enforce the personal liability of petitioner for failure to honor the levy on his indebtedness to Andrews. After a jury trial, the district court entered judgment in the amount of $120,760 in accordance with the verdict against petitioner (Pet. App. 17a).

The court of appeals affirmed (Pet. App. 18a-44a). It held that the statute of limitations in Section 6502 of the Code, providing that the Internal Revenue Service may collect a tax either by levy or civil action only if the levy is made or the proceeding begun within six years after the assessment, is applicable only to actions against taxpayers and not, as in this case, to actions under Section 6332 against third parties in possession of a taxpayer's property or rights to property (Pet. App. 31a).

The court of appeals further held that this suit was not barred by the doctrine of laches. In so ruling, the court adhered to the longstanding principle that laches is not a proper defense against the government. At all events, the court noted that even if laches were applicable, petitioner had failed to prove the essential elements of that defense: (1) lack of diligence by the Internal Revenue Service, and (2) prejudice to petitioner arising from the government's delay in bringing suit (Pet. App. 28a-29a).

ARGUMENT

1. The decision below correctly held that the six-year statute of limitations on the collection of assessed taxes provided in Section 6502(a) of the Code did not bar this action brought by the government against petitioner to enforce personal liability for his failure to honor an Internal Revenue levy. The six-year statute of limitations of Section 6502 governs only collection actions instituted against a taxpayer to collect his assessed liability. It does not apply to an action, such as the instant case, brought by the government against a third party under Section 6332 for failure to honor a levy.

At all events, as the court of appeals observed (Pet. App. 32a-33a), Section 6502 only limits the period, beginning with the date of assessment, within which a levy must be made or a proceeding in court must be begun in order for collection efforts to be deemed to be timely. Here, it is undisputed that on May 2, 1963, the Internal Revenue Service assessed wagering excise taxes in the amount of $688,734 against the taxpayer, Frank Andrews. On the very next day, the government served a notice of levy on petitioner, seizing his debt to Andrews (Pet. App. 20a-21a). At least with respect to an intangible asset, such as a debt, the service of this notice of levy was sufficient to reduce the taxpayer's property rights to the constructive possession of the United States. *Phelps* v. *United States*, 421 U.S. 330 (1975). Thus, by serving a timely notice of levy on petitioner, the government complied with the only requirement imposed by Section 6502. A subsequent action by the government to enforce its right to collect a debt which has been timely seized by levy is not subject to the six-year statute of limitations

applicable to the collection of the underlying assessment. *Moyer* v. *Mathas*, 458 F. 2d 431, 434 (5th Cir. 1972) (timely filing of an action to reduce assessed taxes to judgment satisfies the requirements of Section 6502; later foreclosure action not barred); *United States* v. *Overman*, 424 F. 2d 1142 (9th Cir. 1970). See 9 J.Mertens, *Law of Federal Income Taxation* § 54.66.28, at 318 (1977 rev.). Thus, the court of appeals correctly held (Pet. App. 32a) that there was no statutory time limit on the institution of this suit to enforce the government's levy against petitioner.

2. Although petitioner concedes (Pet. 15-19) that the decisions of this Court establish that the defense of laches does not bar an action brought by the United States (*Costello* v. *United States*, 365 U.S. 265, 281 (1961); *Guaranty Trust Co.* v. *United States*, 304 U.S. 126 (1938)), he nevertheless seeks to invoke that equitable defense, contending that he was prejudiced by the government's failure to bring this action until almost 13 years had elapsed after service of the notice of levy, and that the government failed to show an adequate reason for the delay.

But as the court of appeals properly pointed out (Pet. App. 28a-29a), petitioner's claim of prejudice is refuted by the record. The parties presented 58 joint exhibits at the trial of the case and petitioner introduced three additional exhibits into evidence. These documents covered every detail of the transactions underlying the government's contention that petitioner owed a debt of $120,760 to the taxpayer, Frank Andrews, at the time the notice of levy was served on him. Petitioner's factual contentions at the trial turned primarily on the authenticity of certain of

these documents and the dates on which they were signed. As the court of appeals correctly noted (Pet. App. 29a), neither the documents themselves nor petitioner's credibility as a witness were greatly affected by the passage of time.

Moreover, petitioner's claim that the government did nothing between 1965, when he was acquitted on criminal charges of seeking to conceal his indebtedness to Andrews, and 1976, when this action was brought, is without foundation. Most of the delay in bringing this action can be attributed to the systematic efforts of petitioner and others to mislead and confuse the government agents who were seeking to collect Andrews' tax liabilities. Among other things, petitioner falsely asserted that Andrews had assigned petitioner's note to one Mike Mazzaro, a relative of Andrews, prior to the May 3, 1963 levy (Pet. App. 25a-26a). This claim and certain other indications that Andrews and Mazzaro were involved in fraudulent transactions led to an ultimately unsuccessful attempt by the Internal Revenue Service to collect Andrews' wagering excise tax liabilities from Mazzaro on a theory of transferee liability. *United States* v. *Andrews*, Civ. Action Nos. 1435 and 1438 (E.D. Ky. Sept. 27, 1972).

Finally, as the court of appeals pointed out (Pet. App. 29a), laches is an equitable doctrine, and a litigant seeking to invoke it must come into court with "clean hands." Petitioner's documented record of attempts to mislead and defraud the Internal Revenue Service in connection

with its efforts to collect his debt to Andrews provides ample reason to deny him the right to invoke this equitable relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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